IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 26, 2008

STATE OF TENNESSEE v. DAVID MARZELL BEATTY

Direct Appeal from the Circuit Court for Sullivan County
Nos. S44,185; S43,165 R. Jerry Beck, Judge

No. E2007-01939-CCA-R3-CD - Filed March 31, 2008

The Defendant, David Marzell Beatty,[1] pled guilty on December 10, 2001, to one count of selling a counterfeit controlled substance and two counts of selling over .5 grams of cocaine (case No. S44,185). The trial court sentenced him to eight years on each count of selling cocaine and two years for selling a counterfeit controlled substance, all to run concurrently. The trial court ordered the first 364 days to be served in prison, with the remainder on probation. On that same day, the Defendant pled guilty to failure to appear (case No. S43,165), for which the trial court sentenced him to two years probation to run consecutively to the eight year sentence. On August 4, 2007, the trial court revoked the Defendant's probation after he pled guilty to two counts of misdemeanor domestic assault. On appeal, the Defendant alleges the following: (1) the trial court did not credit the Defendant for time spent in the Sullivan County Jail and in the Tennessee Department of Correction boot camp; (2) the trial court failed to consider mitigating factors; and (3) the Defendant is serving an indeterminate sentence. After a thorough review of the record and applicable law, we affirm the revocation of probation, but we remand to allow re-computation of jail credits.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and J.C. MCLIN, JJ., joined.

Richard A. Spivey, Kingsport, Tennessee, for the Appellant, David Marzell Beatty.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Elizabeth B. Marney, Senior Counsel; H. Greeley Welles, District Attorney General; Joseph Eugene Perrin, Assistant District Attorney General, for the Appellee, the State of Tennessee.

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[1]The Defendant's proper name is, apparently, David M. Anderson. We will refer to him as "the Defendant."

OPINION

I. Facts

The parties presented the following evidence at the probation revocation hearing: The Defendant testified that he was thirty-eight years old and living with his mother in Kingsport. He stated that he had been serving probation for six years after he pled guilty to crimes in 2001. He served roughly two years in Sullivan County Jail before he was admitted to boot camp, where he spent four months. In March of 2007, the Defendant was "picked up on a violation of probation warrant" for which he served another three months in jail. The Defendant testified that, in total, he had spent two years and seven months in jail or at boot camp prior to this latest arrest.

The Defendant also testified that the altercation that led to this probation violation warrant occurred between him and his ex-wife on December 17, 2006. He stated that he suffered from "Bipolar II" and took medication for over a year to treat his disorder. The Defendant stated that he stopped taking the medication prior to the incident because he felt as if he "could live without taking the medication." The Defendant stated that he has a three-year-old daughter with sickle cell anemia, and, at the time of the hearing, she had been admitted into the hospital seventy-seven times. Prior to this latest arrest, he was working three jobs: The Chop House, Domino's Pizza, and E-Z Rentals. He stated that he worked ninety hours per week. Since his arrest, he has kept his employment at The Chop House.

The Defendant testified that, although he became involved with the wrong crowds doing "bad things," he did go "all the way to the 12th grade." He stated that he has begun raising money for children with leukemia, and his daughter has provided a new perspective on life. The Defendant stated that he only became involved in an altercation with his ex-wife because he failed to take his medication.

On cross-examination, the Defendant admitted that he fled to New York after he was charged with the initial counts of sale of cocaine and sale of a counterfeit substance. He claimed he received jail credit for June 25 to August 7, 2001, for time spent in New York before extradition. After extradition, the Defendant was jailed from August 7 to October 9, 2001. Finally, the Defendant served two days on February 25 and 26, 2000. The Defendant admitted that the judgments showed this credit, but he claimed that he spent much more time in jail. The Defendant further stated that he "blacked out" and did not know what happened on the night he assaulted his ex-wife.

The trial court determined that the Defendant violated his probation, and it ordered the Defendant to serve eight years in the Department of Correction. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant asserts the following errors: (1) the trial court did not credit the

Defendant for time spent in the Sullivan County Jail and in the Tennessee Department of Correction boot camp; (2) the trial court failed to consider mitigating factors; and (3) the Defendant is serving an indeterminate sentence.

1. Mitigating Factors

When a trial court determines by a preponderance of the evidence that a probationer has violated the conditions of his or her probation, the trial court has the authority to revoke probation. T.C.A. § 40-35-311(e) (2006). Upon finding that the defendant has violated the conditions of probation, the trial court may revoke the probation and either: (1) order incarceration; (2) order the original probationary period to commence anew; or (3) extend the remaining probationary period for up to two additional years. *State v. Hunter*, 1 S.W.3d 643, 644 (Tenn. 1999); *see* T.C.A. §§ 40-35-308, 310, 311 (2006). The defendant has the right to appeal the revocation of his probation and entry of his original sentence. T.C.A. § 40-35-311(e). Upon finding a violation, the trial court is vested with the statutory authority to "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered . . . ." *Id.*; *accord Hunter*, 1 S.W.3d at 646 (holding that the trial court retains the discretionary authority to order the defendant to serve his or her original sentence in confinement). Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension . . . ." T.C.A. § 40-35-310.

Relative to when a trial court may revoke probation and to the standard of review in an appeal of such an action, our Supreme Court has stated:

> We take note that a trial judge may revoke a sentence of probation or a suspended sentence upon a finding that the defendant has violated the conditions of his probation or suspended sentence by a preponderance of the evidence. T.C.A. § 40-35-311. The judgment of the trial court in this regard will not be disturbed on appeal unless it appears that there has been an abuse of discretion. *State v. Williamson*, 619 S.W.2d 145, 146 (Tenn. Crim. App. 1981). In order for a reviewing court to be warranted in finding an abuse of discretion in a probation revocation case, it must be established that the record contains no substantial evidence to support the conclusion of the trial judge that a violation of the conditions of probation has occurred. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980). The proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial judge to make a conscientious and intelligent judgment. *State v. Milton*, 673 S.W.2d 555, 557 (Tenn. Crim. App. 1984).

State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991).

Our review of the record supports the trial court's determination that the Defendant violated conditions of his probation. One condition of the Defendant's probation was that he obey the laws

of the United States. It is undisputed that the Defendant pled no contest to two counts of domestic assault in violation of this condition. At the hearing, the Defendant testified to what he believed were mitigating factors. The trial court heard the testimony and ruled as follows:

> **The Court**: He has violated the terms and conditions of his probation. He's pled guilty to it. I don't see mitigation of having three crimes of violence after you've been – two crimes of violence while you're on boot camp release.
>
> **Mr. Spivey**: Without regard, Your Honor, to his work history or the fact that he suffered from a bipolar condition which caused that?
>
> **The Court**: What I have to do, weigh good and favorable factors against bad factors. I can't imagine anything worse than being out of boot camp, out of prison, and committing two assaults while you're doing that.
>
> **Mr. Spivey**: That was six years ago, Your Honor. I mean, he's made it six years on the street and worked three jobs.
>
> **The Court**: Well, his – well, his assaults were on – he was out. He'd been forgiven. The assaults were recent.

We conclude that the trial court made a conscientious and intelligent judgment on this issue, and we find substantial evidence to support its decision. The trial court did not abuse its discretion, and the Defendant is not entitled to relief on this issue.

2. Credits and Indeterminate Sentence

The Defendant next argues that the trial court failed to properly give him credit for time served. Additionally, he argues, the court's decision that he return to jail to serve an eight-year sentence violates the requirement that he serve a determinate sentence. As we view these issues as somewhat related, we will address them together.

From our review of the record, we have pieced together what appears to be the relevant time line:

February 25-26, 2000: The Defendant was arrested on the initial charges of sale of cocaine and sale of a counterfeit controlled substance. He spent these two days in jail for which he has received two days credit per the Revocation Order.

June 26, 2000: The Defendant was scheduled to appear in court on the charges pending. He did not appear, resulting in the failure to appear charge. His whereabouts were unknown.

June 25 to August 7, 2001: The Defendant is arrested in New York, and he spends this time in jail

awaiting extradition. The Revocation Order does not note that the Defendant received jail credit for this time.

August 7 to October 9, 2001: After being extradited to Tennessee, the Defendant remains in jail and received credit totaling sixty-four days.

October 9, 2001: The Defendant pled guilty to the charges and received a sentence of 364 days in jail followed by probation.

October 9, 2001 to March 20, 2003: The Defendant served a jail sentence on the underlying charges. The Revocation Order does not note that the Defendant received jail credit for this time.

March 20 to early May 2003: The Defendant resided in Boot Camp. The Revocation Order does not note that the Defendant received jail credit for this time.

May 2003 to March 7, 2007: The Defendant served probation.

March 7, 2007 to June 7, 2007: The Defendant served ninety-days on the domestic assault charges that are the basis for the probation revocation in this case. He received ninety days credit per the Revocation Order.

July 30, 2007: The Defendant's probation was revoked. He received one day of credit for this day per the Revocation Order.

Thus, it appears to this Court, in accordance with the probation revocation order, that the Defendant has received approximately 157 days of credit. The Defendant's main point of contention is that he has not received the 528 days he claims he was in jail after his initial conviction, prior to boot camp. We recognize that the Defendant's argument is bolstered by the Arrest Warrant Affidavit, which states that the Defendant was sentenced on October 9, 2001, and he received probation to Boot Camp on March 20, 2003.

Once the Defendant's probation was revoked and his eight-year sentence of incarceration was instituted, he should have received appropriate credit towards the eight years. T.C.A. § 40-23-101 (2006) ("The defendant shall also receive credit on the sentence for the time served in the jail, workhouse or penitentiary subsequent to any conviction arising out of the original offense for which the defendant was tried."); *Trigg v. State*, 523 S.W.2d 375, 376 (Tenn. Crim. App. 1975) ("It is only when the time spent in jail or prison is due to or, as the statute says, 'arises out of' the offense for which the sentence against which the credit is claimed that such allowance becomes a matter of right."). Because the Defendant spent time in jail on the underlying offenses, that time appears to fall squarely within the requirement of "arising out of." The State argues that the trial court gave credit properly per the original judgment forms. It is clear, however, that the judgment forms do not reflect time spent in jail after the judgment forms were entered. Thus, in our view, the record supports the Defendant's argument that the trial court erred in computing the jail credits.

The Defendant's indefinite sentence argument is potentially made moot by the trial court's re-review of his jail credits. The Defendant originally received an eight-year sentence. After a period of time spent in jail, he served probation for a number of years. The time spend in probation does not count towards the eight-year total. *See Young v. State*, 539 S.W.2d 850, 854-55 (Tenn. Crim. App. 1976). Once the trial court revoked his probation, the original eight-year sentence was re-instituted. With the proper jail credits, that is a determinate sentence.

The Defendant notes that, if he were to receive all of his jail credits, he would have already surpassed the initial release eligibility date. We point out, however, that the release eligibility date is only the first opportunity for a defendant to be released; he has no right to be released, *see* T.C.A. § 40-35-501(b) (2006) ("Release on parole is a privilege and not a right . . . ."), unless the sentence is under 2 years. *See* T.C.A. § 40-35-501(a)(3) (2006) ("Notwithstanding any other provision of law, inmates with felony sentences of two (2) years or less shall have the remainder of their original sentences suspended upon reaching their release eligibility date."). As a result, "[t]he release eligibility date . . . is the earliest date an inmate convicted of a felony is eligible for parole . . . ." T.C.A. § 40-35-501(k). The fact that the Defendant may have already accrued enough jail credits to reach his release eligibility date does not prevent him from returning to jail. His release will be controlled by the Department of Correction.

III. Conclusion

After due consideration of the issues, we conclude that the trial court erred in denying the Defendant the proper jail credits. As such, we affirm the judgment of the trial court as to the revocation of probation, but we remand the case for further proceedings not inconsistent with this opinion.

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ROBERT W. WEDEMEYER, JUDGE